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No. 95-1226

In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANK J. KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL., PETITIONERS

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 601 of the Federal Aviation Administration Authorization Act of 1994 prohibits States from enacting or enforcing any law or regulation related to a price, route, or service with respect to the motor carriage of property. This case presents the following questions on the merits:

1. Whether Section 601, by preempting state laws governing the intrastate transportation of property by motor carrier, exceeds Congress's powers under the Commerce Clause of the United States Constitution.

2. Whether Section 601 violates the Tenth Amendment of the Constitution by encroaching on powers reserved to the States.

3. Whether Section 601 violates the Guarantee Clause of the Constitution by denying the States a republican form of government.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

American Airlines, Inc. v. *Wolens*, 115 S. Ct. 817 (1995)	8
Building & Trades Council v. *Associated Builders & Contractors*, 507 U.S. 218 (1993)	11
Freightliner v. *Myrick*, 115 S. Ct. 1483 (1995)	7
Golden State Transit Corp. v. *City of Los Angeles*, 493 U.S. 103 (1989)	11
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964)	10
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)	10
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977)	8
Katzenbach v. *McClung*, 379 U.S. 294 (1964)	10
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	9
Maryland v. *Wirtz*, 392 U.S. 183 (1968)	10
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992)	8
New York v. *United States*, 505 U.S. 144 (1992)	11, 12
Perez v. *United States*, 402 U.S. 146 (1971)	10
Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978)	11
United States v. *Lopez*, 115 S. Ct. 1624 (1995)	6, 9, 10

Constitution and statutes:

U.S. Const.:	
Art. I, § 8:	
Cl. 3 (Commerce Clause)	4, 5, 6, 9

Constitution and statutes: Page

Cl. 18 6
Art. III 9
Art. IV, § 1 (Guarantee Clause) 4, 5, 7, 11, 12
Art. VI, Cl. 2 (Supremacy Clause) 7
Amend. X 4, 5, 6, 10, 11
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* ... 8
5 U.S.C. 702 8
5 U.S.C. 704 8
Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1605 1-2
§ 601, 108 Stat. 1605 ..... *passim*
§ 601(a)(1), 108 Stat. 1605 2
§ 601(b)(1), 108 Stat. 1605-1606 (to be codified at 49 U.S.C. 41713(b)) 3, 4
§ 601(c), 108 Stat. 1606 (49 U.S.C. 11501) 3-4

Miscellaneous:

H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. (1994) 2, 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 69 F.3d 1503. The opinion of the district court (Pet. App. 19-43) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1995. The petition for a writ of certiorari was filed on January 31, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 601 of the Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305,

108 Stat. 1605, took effect nationwide (except in Hawaii) on January 1, 1995. That provision preempts state regulation of prices, routes, or services of motor carriers engaged in the transportation of property. Section 601(a)(1) sets forth congressional findings that

> (1) the regulation of intrastate transportation of property by the States has —
>
> (A) imposed an unreasonable burden on interstate commerce;
>
> (B) impeded the free flow of trade, traffic, and transportation of interstate commerce; and
>
> (C) placed an unreasonable cost on the American consumers * * *

108 Stat. 1605. The Conference Report explains in greater detail Congress's determination that divergent State-by-State regulation of motor carrier operations causes significant "inefficiencies, increased costs, reduction of competition, [and] inhibition of innovation and technology," and "curtails the expansion of markets." H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 87 (1994). Congress also found that elimination of state-imposed economic regulation of motor carriers could result in annual savings in the range of $3 to 12 billion. *Ibid.*[*]

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[*] The Conference Report explains that "[t]he sheer diversity of these regulatory schemes [wa]s a huge problem for national and regional carriers attempting to conduct a standard way of doing business." H.R. Conf. Rep. No. 677, *supra*, at 87. For instance, evidence adduced at congressional hearings disclosed "numerous examples" where it cost more to ship goods within a State than to ship them a comparable distance between States. *Ibid.* In the small package business, "companies frequently ship[ped] goods across state lines and back

Section 601 includes separate preemption provisions for carriers affiliated with air carriers, and for motor carriers without such affiliations. Section 601(b)(1) amends 49 U.S.C. 41713(b) by adding the following paragraph:

> (4) TRANSPORTATION BY AIR CARRIER OR CARRIER AFFILIATED WITH A DIRECT AIR CARRIER. —
>
> (A) GENERAL RULE.—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

108 Stat. 1605. Section 601(c) amends 49 U.S.C. 11501 by adding the following paragraph:

> (h) PREEMPTION OF STATE ECONOMIC REGULATION OF MOTOR CARRIERS. —
>
> (1) GENERAL RULE. — Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or

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into the state of origin to avoid the higher rates for purely intrastate shipments." *Id.* at 87-88.

> service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) of this title) or any motor private carrier with respect to the transportation of property.

108 Stat. 1606.

Section 601 preserves the authority of the States to regulate in traditional areas of state regulation, including highway safety. Thus, Section 601 makes clear that it "shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." § 601(b)(1), 108 Stat. 1605-1606; § 601(c), 108 Stat. 1606.

2. Petitioners filed suit in the United States District Court for the Western District of Oklahoma, contending that Section 601 exceeds Congress's authority under the Commerce Clause, and that it violates the Tenth Amendment and the Guarantee Clause of the Constitution. Following a trial on the merits, the district court dismissed the complaint and denied the requested injunctive and declaratory relief. Pet. App. 19-45. As an initial matter, the court held that, although Section 601's preemption provisions are self-executing and do not provide for any implementing or enforcement action by the Attorney General or other federal officials, petitioners were not barred by sovereign immunity principles from bringing this action against the United States and

the Attorney General for declaratory and injunctive relief. Pet. App. 21-32.

On the merits, however, the court rejected petitioners' claims. Pet. App. 33-42. Relying upon the legislative history of Section 601 and other evidence before it, the court concluded that "there is a rational basis for Congress's finding that the intrastate activity—state regulation of intrastate transportation of property—not only affects but unreasonably burdens interstate commerce." Pet. App. 38-39. The court also determined that the approach chosen by Congress—broad preemption of applicable state laws —is "reasonably adapted to an end permitted by the Constitution, the regulation of interstate commerce and elimination of burdens and impediments to commerce among the States." *Id.* at 40. In rejecting petitioners' Tenth Amendment challenge, the court observed that Section 601 "does not direct, coerce or even require the States to do anything," Pet. App 41-42, and it concluded that Section 601 therefore "does not intrude on the sovereignty reserved to the States by the Tenth Amendment," Pet. App. 42. Finally, the court rejected petitioners' argument under the Guarantee Clause, observing that "the fairly ordinary exercise of Congress' power under the Commerce Clause and power to completely preempt state law * * * cannot reasonably be said to deny any State a republican form of government." *Ibid.*

The court of appeals affirmed. Pet. App. 1-18. It held that the district court was authorized to entertain the suit, *id.* at 7-9, but rejected petitioners' claims on the merits, *id.* at 9-18. The court of appeals concluded that Section 601 constitutes a valid exercise of congressional authority under the Commerce Clause "[t]o regulate Commerce * * * among the

several States," Art. 1, § 8, Cl. 3, and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," Art. 1, § 8, Cl. 18. Pet. App. 9. The court observed that

> in *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), the Supreme Court identified three broad categories of activity that Congress may regulate under the Commerce Clause: (1) "the use of channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities that substantially affect interstate commerce."

Pet. App. 9 (quoting *United States* v. *Lopez*, 115 S. Ct. 1624, 1629 (1995)). The court of appeals held that the activity addressed by Section 601—state regulation of intrastate motor carrier activities—"falls squarely within the third category of activity cited in *Lopez*." Pet. App. 9. In the court's view, "Congress rationally determined [that] the regulation of intrastate motor carrier activities, considered as a whole, does in fact impact and impede interstate commerce." *Id.* at 11. The court further determined that "the means chosen by Congress are reasonably adapted to the ends sought," *id.* at 12, explaining that the preemption of state regulations pertaining to prices, routes, and services of intrastate motor carriers "clearly serves to eliminate the 'patchwork' of varying state regulations that concerned Congress," *ibid.*

The court of appeals then addressed and rejected petitioners' claim under the Tenth Amendment. The court observed that "Congress may, under the Supremacy Clause, preempt an entire field of regulation and thereby deprive the states of any regulatory role." Pet. App. 15 (internal quotation marks

omitted). Here, it explained, "Congress has not compelled the states to voluntarily act by enacting or administering a federal regulatory program. Rather, Congress has simply imposed rules on the states via its Supremacy Clause powers." *Ibid.* Finally, the court rejected petitioners' contention that Section 601 violates the Guarantee Clause. Pet. App. 16-18. The court assumed without deciding that petitioners' claim was justiciable, but held it to be without merit, explaining that "Section 601 is a substantive constraint on the power of state governments to regulate interstate trucking, not a fundamental restructuring of the form of state governments." *Id.* at 18 (internal quotation marks omitted).

ARGUMENT

The court of appeals correctly rejected petitioners' constitutional claims on the merits. That decision is consistent with the rulings of this Court, and is not in conflict with any decision of another court of appeals. Further review is not warranted.

1. As an initial matter, we disagree with the conclusion by the courts below that the district court properly entertained this action against the United States and the Attorney General for broad declaratory and injunctive relief concerning the constitutionality of Section 601. The usual way in which preemption questions are resolved by the courts is through a suit brought by state officials or private individuals who seek to enforce state law; in such a suit, the defendant may then claim that the state law on which the plaintiff relies is invalid under the Supremacy Clause, Art. VI, Cl. 2, and therefore cannot be given effect by the courts. See, *e.g.*, *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483 (1995);

American Airlines, Inc. v. *Wolens*, 115 S. Ct. 817 (1995). Alternatively, a person who is threatened by state officials with enforcement of a state law that the person believes is preempted by federal law may bring an action to enjoin the responsible state officials from doing so. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977). Petitioners, however, have not sought to enforce state law against regulated private parties, but have instead attempted to litigate the preemption issue with the federal government. There is no waiver of sovereign immunity that authorizes such an action.

Section 601 is self-executing in its effect on state laws; it neither provides for and nor requires any implementing or enforcement action by the Attorney General or other federal officials. As a result, the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, furnishes no basis for suit, for the APA authorizes suits only to challenge final "agency action" of a federal agency. See 5 U.S.C. 704. Similarly, the express waiver of sovereign immunity in the APA applies only in a suit "stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. 702.

The district court and court of appeals nevertheless believed that sovereign immunity does not interpose a bar because petitioners seek to enjoin enforcement of an allegedly unconstitutional statute. Pet. App. 8-9, 24. But again, Section 601 assigns no enforcement role to the Attorney General or other federal official, and the courts below in any event pointed to no imminent threat of a suit by the Attorney General seeking to enjoin them from enforcing any state laws

that are preempted by Section 601. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Indeed, any injury that petitioners allege is traceable not to any action that might be taken by the Attorney General, but to Section 601 itself; and any such injury would not be redressed in this action, because a judgment against the Attorney General or the United States as a party would not preclude private persons who are not parties to this suit from relying on Section 601 in future litigation against petitioners or others. See *Defenders of Wildlife*, 504 U.S. at 560-561.

In addition, this suit, which is divorced from any particular application of state law that allegedly is inconsistent with Section 601, presents the preemption question in an abstract posture and raises numerous hypothetical issues regarding possible interpretations and applications of Section 601. See, *e.g.*, Pet. App. 12. Accordingly, even if Article III requirements were met, this would not be an appropriate case for the award of the equitable relief of an injunction or declaratory judgment invalidating Section 601.

2. Having reached the merits, however, the court of appeals properly rejected petitioners' facial challenge to Section 601, correctly concluding that that Section is a permissible exercise of Congress's powers under the Commerce Clause. This Court recently reaffirmed that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 115 S. Ct. at 1629-1630 (citation omitted). As the court of appeals in the instant case recognized, "Congress made express findings,

set forth in subsection (a) of § 601, that state regulation of intrastate motor carrier activities substantially affects interstate commerce." Pet. App. 9-10. The court of appeals determined that those findings were rational, *id.* at 11, and that "the means chosen by Congress are reasonably adapted to the ends sought," *id.* at 12.

The court of appeals' analysis is fully consistent with this Court's precedents. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964). Indeed, petitioners do not contend that the court of appeals applied the wrong legal standard; they simply argue that the court misapplied that standard to the circumstances at hand. See Pet. 16-17. Petitioners' claim lacks merit and does not, in the absence of a circuit conflict regarding the constitutionality of Section 601, provide a basis for this Court's review.

The court of appeals also correctly rejected petitioners' contention that Section 601's broad preemption of state motor carriage regulation is improper because particular activities falling within the Section's coverage have no substantial effect on interstate commerce. "[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Lopez*, 115 S. Ct. at 1629 (emphasis omitted) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)); see also *Perez* v. *United States*, 402 U.S. 146, 154 (1971).

3. Petitioners' Tenth Amendment challenge to Section 601 is also without merit. Although "Congress may not simply 'commandee[r] the legislative

processes of the States by directly compelling them to enact and enforce a federal regulatory program,'" *New York* v. *United States*, 505 U.S. 144, 161 (1992), Congress has made no attempt to do that here. As the court of appeals recognized, Congress, in enacting Section 601, "has not compelled the states to voluntarily act by enacting or administering a federal regulatory program." Pet. App. 15. Rather, it has decided to "preempt an entire field of regulation and thereby deprive the states of any regulatory role." *Ibid.* (internal quotation marks omitted).

Petitioners acknowledge, as a general matter, that "Congress may, consistent with its authority under the Commerce Clause, preempt state regulation." Pet. 9. They contend, however, that Section 601 violates the Tenth Amendment because "Congress preempted state regulation of intrastate motor carriers, but it did not replace such regulation with federal standards." *Ibid.* That distinction is without constitutional significance. As this Court has repeatedly recognized, Congress may determine that certain spheres of private activity should be left "to be controlled by the free play of economic forces," *Building & Construction Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218, 225 (1993) (internal quotation marks omitted), and may act on that basis to preempt state regulation without substituting a federal regulatory regime. See, *e.g.*, *id.* at 225-226; *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 110-111 (1989); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).

4. Finally, the court of appeals correctly rejected petitioners' claim under the Guarantee Clause. As that court recognized, "it is difficult to understand how § 601 could be construed in any way as affecting

the states' ability to structure their own governments as they see fit." Pet. App. 18. Compare *New York*, 505 U.S. at 186 (Court rejected Guarantee Clause claim because challenged provisions "do not pose any realistic risk of altering the form or the method of functioning of New York's government"). Where the preemption of state law is otherwise within Congress's power, the consequent displacement of state authority over private conduct cannot be held invalid on the ground that it denies the State a republican form of government. Thus, even assuming that petitioners' Guarantee Clause claim is justiciable, see *id.* at 184-186; Pet. App. 17-18, that claim is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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